

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff - Respondent,

Case No. 14-cr-20794

v

Honorable Thomas L. Ludington

WILLIAM MCARTHUR SMITH,

Defendant - Petitioner.

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**ORDER ADOPTING REPORT AND RECOMMENDATION, DENYING  
PETITIONER'S MOTION TO VACATE, DENYING CERTIFICATE OF  
APPEALABILITY AND DENYING LEAVE TO APPEAL IN FORMA PAUPERIS**

On December 16, 2014, Petitioner William McArthur Smith pleaded guilty to Distribution of Cocaine Base, 21 U.S.C. § 841(a)(1), and Using or Carrying a Firearm During and In Relation to a Drug Trafficking Crime, 18 U.S.C. § 924(c)(1)(A). Plea Agreement, ECF No. 20. On April 6, 2015, the Court entered judgment, sentencing Smith to a total of 100 months' imprisonment. J. 2, ECF No. 27.

On June 21, 2015, Smith filed a motion for leave to file a late notice of direct appeal. Because Smith's motion was untimely, the Court denied it on July 17, 2015. *See* Order 2 (quoting *United States v. Tarrant*, 158 F.3d 946 at \*3 (6th Cir. 1998)). Smith's attempt to appeal the order denying him leave to appeal was dismissed by the Sixth Circuit on December 15, 2015. *See* ECF No. 33.

Over a year after his judgment became final, on July 1, 2016, Petitioner Smith filed a motion to vacate his sentence under 28 U.S.C. § 2255, arguing that his conviction and sentence was rendered unconstitutional by the Supreme Court's decision in *Johnson v. United States*, 135

S. Ct. 2551 (2015) (striking down the residual clause of the Armed Career Criminal Act as unconstitutionally vague). *See* ECF No. 37. That motion was referred to Magistrate Judge Patricia T. Morris. *See* ECF No. 41. On January 19, 2017 the magistrate judge issued her report recommending that Smith's motion to vacate be denied. *See* ECF No. 143. The magistrate judge reasoned that *Johnson* was inapplicable to Smith's conviction and sentence under § 924(c).

Although the magistrate judge's report explicitly states that the parties to this action could object to and seek review of the recommendation within fourteen days of service of the report, neither party has filed any objections. The election not to file objections to the magistrate judge's report releases the Court from its duty to independently review the record. *Thomas v. Arn*, 474 U.S. 140, 149 (1985). The failure to file objections to the report and recommendation waives any further right to appeal.

The Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, a certificate of appealability is not warranted in this case. The Court further concludes that Petitioner should not be granted leave to proceed *in forma pauperis* on appeal, as any appeal would be frivolous. *See* Fed. R. App. P. 24(a).

Accordingly, it is **ORDERED** that the magistrate judge's report and recommendation, ECF No. 44, is **ADOPTED**.

It is further **ORDERED** that Petitioner William McArthur Smith's motion to vacate his sentence, ECF No. 37, is **DENIED**.

It is further **ORDERED** that a certificate of appealability is **DENIED**.

It is further **ORDERED** that leave to proceed *in forma pauperis* on appeal is **DENIED**.

s/Thomas L. Ludington  
THOMAS L. LUDINGTON  
United States District Judge

Dated: February 22, 2017

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on February 22, 2017.

s/Kelly Winslow for \_\_\_\_\_  
MICHAEL A. SIAN, Case Manager